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Supreme Court, U.S.
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In The

# Supreme Court of the United States

JOSEPH V. MAZARES, JR. and
MICHAEL R. TESTMAN,

*Petitioners,*

v.

DEPARTMENT OF THE NAVY,

*Respondent.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

## REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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## ARGUMENT

Respondent, Department of the Navy ("Navy"), advances two arguments in support of its position that further review is not warranted. Both of these arguments are without merit.

### I. The Navy Without Merit Asserts That It May Lawfully Order Civilian Mariners to Take the Anthrax Vaccine

The Navy cites to three documents in support of its argument that it may lawfully order civilian mariners ("CIVMAR") to take the anthrax vaccine. Specifically, the Navy erroneously relies on: (1) a March 1999 Department of Defense Memorandum; (2) BUMEDINST 6230.15, a document promulgated by the Navy Surgeon General; and (3) SECNAVINST 6230.4, an instruction issued by the Secretary of the Navy. None of these documents, however, provides support for such authority.

#### A. March 1999 Department of Defense Memorandum

In March 1999, the Department of Defense ("DoD") issued a memorandum regarding the applicability of the anthrax vaccine to civilian employees:

> "Effectively immediately, the AVIP (Anthrax Vaccine Immunization Program) will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees.... **Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor**

> **personnel who are *not* designated as emergency essential."**

(App. 74-75) (emphasis added).

The Navy argues (Resp. 8) that this "memorandum in no way purports to prohibit commanders from requiring particular classes of civilian employees, such as CIVMARs, to undergo anthrax vaccination in response to specific operational requirements." The Navy further asserts (Resp. 9) that not allowing it to vaccinate CIVMARs with the anthrax vaccine would lead to an "absurd" result:

> "Under petitioners' reading, the Navy was *prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area, but was *required* to vaccinate another group of employees ("emergency essential" employees) who were entering the same high-threat area."

The Navy foolishly characterizes Mazares' and Testman's argument as "absurd" because it clearly does *not* understand the legal difference between a CIVMAR and a civilian employee designated as "emergency essential." Under DoD Directive 1404.10, an "emergency essential" civilian employee is defined as follows:

> "A civilian position located overseas or that would be transferred overseas during a crisis situation or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation."

Additionally, under Directive 1404.10, an employee designated as "emergency essential" will receive a pay allowance, benefits and entitlements commensurate with the

level of physical harm or imminent danger being encountered. Finally, under Directive 1404.10, a civilian employee before being designated as "emergency essential" may ***refuse*** the designation and ***shall*** be reassigned expeditiously, without loss of grade or pay, to a "non-emergency essential" position.

Therefore, the intent of the March 1999 DoD Memorandum is very clear: the DoD authorized ***only*** civilians designated as "emergency essential" to be vaccinated with the anthrax vaccine because these civilian employees may refuse the designation (and thus not have to undergo the vaccination), or accept the designation and receive higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered.

Accordingly, the Navy is "*prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area" because these civilian employees have *not* agreed to accept the risks associated with the anthrax vaccination, nor have these civilian employees received higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered. Moreover, the Navy is *required* to vaccinate another group of civilian employees ("emergency essential") who were entering the same high-threat area as the CIVMARs because these civilian employees have received higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered.

### B. BUMEDINST 6230.15

In 1995, the Navy Surgeon General promulgated BUMEDINST 6230.15 to establish general principles, procedures, policies, and responsibilities for the Navy's immunization programs (App. 80-87). BUMEDINST 6230.15 provides that CIVMARs are subject to the same immunization requirements as all "alert forces" (App. 85). The word "anthrax," however, does not appear anywhere in BUMEDINST 6230.15.

The Navy asserts (Resp. 6, footnote 1) that the scope of the directive was modified in April 1998 by the Navy Surgeon General to cover anthrax. **This is the first time that the Navy raises this argument.** Regardless, the March 1999 DoD Memorandum regarding the applicability of the anthrax vaccine to civilian employees was issued eleven months **after** the April 1998 modification. Therefore, the DoD's memorandum *supercedes* anything stated to the contrary in the April 1998 modification by the Navy Surgeon General.

### C. SECNAVINST 6230.4

In April 1998, the Secretary of the Navy issued an instruction regarding vaccinations. The instruction states that "[f]ederal civilian employees and other groups having status equivalent to deployable forces . . . are subject to the same immunization requirements as active duty personnel" (App. 88). However, the same instruction states, "Immunization against anthrax is indicated for those employees (DON civilians) whose duties classify them *'Mission Essential'* and place them at risk for exposure to anthrax used as a biological weapon in a combat or

operational setting" (emphasis added) (App. 89). Finally, the instruction states the following:

> "For the purposes of this plan, risk does not include the potential for anthrax used in acts of terrorism against noncombatants. Examples of employees who should be immunized include those who work in, or are likely to be deployed to, areas of operations identified as high risk."

(App. 89).

Although Mazares and Testman have *never* been designated as "*Mission Essential*" employees and the Navy has *never* made a contrary assertion, the Navy still asserts (Resp. 7, footnote 2) that SECNAVINST 6230.4 applies to them. The Navy argues that the last part of the instruction indicates that "any" civilian employee working in a "high risk" area should be immunized. The Navy is clearly overreaching for this interpretation. The intent of the last part of the instruction is simply to give an example of a civilian employee who should be classified as "*Mission Essential.*"

Regardless of whose interpretation of SECNAVINST 6230.4 is more accurate, the March 1999 DoD Memorandum regarding the applicability of the anthrax vaccine to civilian employees was issued eleven months **after** SECNAVINST 6230.4. Therefore, the DoD's memorandum *supercedes* anything stated to the contrary by the Secretary of the Navy in SECNAVINST 6230.4.

## II. The Navy's Reliance on the August 2002 DoD Memorandum Reintroducing the Anthrax Vaccination Program Evidences the Importance of Further Review by this Court

In 2000, after Mazares and Testman had already been terminated from civilian service, the Navy ceased requiring CIVMARs to take the anthrax vaccine. As set forth in the Navy's opposition (Resp. 9-10), the DoD in August 2002 issued a revised memorandum reintroducing the anthrax vaccination program (Supp. App. 1-9). The August 2002 memorandum *now* requires CIVMARs to take the anthrax vaccine (Supp. App. 2).[1] The Navy cites to the August 2002 DoD Memorandum *not* in support of its decision to terminate Mazares and Testman, but in support of its argument that "there is no reason for this Court to grant plenary review ... of a policy memorandum [March 1999] that is no longer in effect." **This is the first time that the Navy raises this argument.**

The Navy's argument is without merit for two reasons. First, the August 2002 DoD Memorandum clearly supports Mazares' and Testman's assertion that under the March 1999 DoD Memorandum (App. 74-75) the Navy did *not* have authority to order CIVMARs to take the anthrax vaccine. In the August 2002 Memorandum, the DoD, by adding two new groups of civilian employees including CIVMARs who may be required to take the anthrax

[1] The August 2002 DoD Memorandum requires the following civilian employees to take the anthrax vaccine (Supp. App. 2): civilian employees designated as "emergency essential"; certain contractor personnel; and, alert forces including CIVMARs. In contrast, the March 1999 DoD Memorandum ***only*** required civilian employees designated as "emergency essential" to take the anthrax vaccine (App. 74-75).

vaccine, is essentially admitting that the March 1999 Memorandum did *not* apply to these two new groups including CIVMARs.

Second, most importantly, the August 2002 DoD Memorandum permits the Court to address future policy concerns regarding federal civilian employees being ordered *without* consent to take the anthrax vaccine, or any other potentially debilitating vaccine. Under the March 1999 DoD Memorandum, only civilian employees designated as "emergency essential" were required to take the anthrax vaccine. As previously discussed, under DoD Directive 1404.10, a civilian employee before being designated as "emergency essential" may ***refuse*** the designation and ***shall*** be reassigned expeditiously, without loss of grade or pay, to a "non-emergency essential" position.

Now, under the August 2002 DoD Memorandum, a CIVMAR has no option but to take the anthrax vaccine or risk being terminated. In the present case, Mazares had been employed for eleven years before being requested to take the anthrax vaccine. The taking of the anthrax vaccine was *not* a condition of his employment when he was hired. The Court has never addressed the issue of whether the Navy may lawfully order CIVMARs to take the anthrax vaccine without the option of being reassigned.

Similarly, in the future, several other federal civilian employees will be required, without the option of being reassigned, to take a potentially debilitating vaccine that was *not* a condition of their employment before being hired. The Court has never specifically addressed the issue of whether the federal government may lawfully order civilian employees to take a potentially debilitating vaccine

that was not a condition of their employment before being hired. Unless the Court addresses this issue, these civilian employees will face the same fate as Mazares and Testman.

Finally, in the present case, the Navy in violation of the March 1999 DoD Memorandum ordered Mazares and Testman to take the anthrax vaccine. The Court has never addressed the issue of whether a *subordinate* military department may defy a "specific" DoD policy. In the future, several Executive Cabinet Secretaries will issue orders regarding the vaccination of federal civilian employees. Subordinate department heads will be in charge of implementing these orders. Similar to the present case, issues will arise as to whether the subordinate department head has followed the vaccination policy set forth by the Executive Cabinet Secretary. Unless the Court addresses this issue, there will be uncertainty in the future when a department head issues an order to a federal civilian employee to take a vaccination that is not specifically required by the Executive Cabinet Secretary.

## CONCLUSION

For all of the reasons stated herein, the court's first impression decision affirming the Navy's authority to vaccinate CIVMARs departs from the accepted and usual course of judicial proceedings and therefore calls for an exercise of this Court's supervisory power. Additionally, the August 2002 DoD policy on the anthrax vaccination raises future policy concerns that call for an exercise of

this Court's supervisory power. Accordingly, this petition for writ of certiorari should be granted.

Dated: March 12, 2003

Respectfully submitted,

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[SEAL]

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PERSONNEL AND READINESS

AUG 6 2002

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE ASSISTANT SECRETARIES OF DEFENSE GENERAL COUNSEL, DEPARTMENT OF DEFENSE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE DIRECTORS OF DEFENSE AGENCIES COMMANDANT OF THE US COAST GUARD

SUBJECT: Policy on Administrative Issues Related to the Anthrax Vaccine Immunization Program (AVIP)

REFERENCE: Secretary of Defense Memorandum, "Reintroduction of the Anthrax Vaccine Immunization Program," June 28, 2002.

This memorandum provides policy guidance on administrative issues involving anthrax vaccinations.

Applicability and Scope

The scope of the AVIP policy includes personnel assigned to or deployed for more than 15 consecutive days in higher threat areas. Commanders will submit requests for exceptions (for example, persons rotating into higher threat areas repeatedly for more than 15 cumulative days in a 12-month period) to the Combatant Commander with responsibility for the designated higher threat area. Based upon subsequent recommendation of the Combatant Commander, exceptions will be determined by the

ASD(HA), in consultation with the Chairman of the Joint Chiefs of Staff. Personnel who will rotate out of assignment or re-deploy from higher threat areas in 90 days or less from the date of this memorandum will not be required to start vaccination at this time.

In addition to military personnel, the following personnel categories are subject to this policy:

- DoD civilian personnel classified as emergency-essential under DoD Directive 1404.10, "Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees," April 10, 1999
- Contractor personnel carrying out mission essential services as described in DoDI 3020.37, "Continuation of Essential DoD Contractor Services During Crisis," November 6, 1990;
- Other personnel categorized as alert forces, as defined in the joint regulation on Immunizations and Chemoprophylaxis (Air Force Joint Instruction 48-110, Army Regulation 40-562, BUMEDINST 6230.15, CG COMDTINST M6230.4E).

The Secretaries of the Military Departments, Commandant of the Coast Guard, and Combatant Commanders may also identify and recommend other cohorts of personnel for vaccination against anthrax through the Executive Agent to the ASD(HA), if they deem their occupations may place them at higher risk for exposure to anthrax, and their performance is essential for certain mission critical capabilities.

Component Plans

Each Service and Defense Agency shall develop operational plans to administer the vaccinations to personnel initiating and resuming the series. In addition, the Services and affected Defense Agencies shall develop detailed educational plans to inform personnel about the vaccine and the overall program through multiple information outlets. The education plans shall include information about benefits, side effects, and other medical information to be provided before anthrax vaccination. For personnel for whom the dosing schedule was interrupted, the educational materials shall include information on the interruption and the deferred dosing schedule. The education plans shall include provider education and in-service training materials to describe lessons learned. The plans shall designate communications tools, including Internet websites, for disseminating lessons learned from early portions of the program. Resumption shall commence only after the Assistant Secretary of Defense for Force Management Policy, or his designee has approved the component plans.

The plans shall incorporate healthcare access guidance for all active, reserve, emergency-essential civilian and contractor personnel affected by this policy. Guidance shall include information on access to care for personnel: 1) located near or on a military installation, 2) in a remote location, or 3) in a travel duty or leave status.

Resumption Phasing

Threat and risk shall determine resumption priority. Service members and designated civilian personnel in the higher threat areas shall receive priority because they are at higher risk. Those individuals that have had their doses

deferred shall resume the series when directed by the USD (P&R). The phasing policy should proceed as quickly as practicable, consistent with logistical constraints and management process considerations.

Record-Keeping

Each Component is responsible for implementation of a comprehensive immunization tracking system that incorporates member data, unit data, and vaccine lot information. Each Service shall monitor documentation of immunization data. Each Service shall perform annual audits of the immunization tracking system, including both the Active and Reserve personnel. Such audits shall be subject to review by the DoD Inspector General.

Reserve Component Personnel

Reserve Component (RC) personnel shall be in a duty status when receiving a DoD-directed immunization. Unit commanders must ensure all personnel to be immunized are in a duty status and they receive notification of the immunization requirement. Services will emphasize this policy in all appropriate communications.

Reserve Component members who incur or aggravate any injury, illness, or disease while performing active duty for less than 30 days, or on inactive duty training are entitled to medical care appropriate for the treatment of the injury, illness or disease. An adverse reaction from a DoD-directed immunization is a line of duty condition. Therefore, when a member of the RC presents for treatment at a Military Treatment Facility (MTF), expressing a belief that the condition for which treatment is sought is related to receiving an immunization during a period of

duty, the member must be examined and provided necessary medical care.

When treatment has been rendered or the individual's emergent condition is stabilized, a Line of Duty and/or Notice of Eligibility will be determined as soon as possible. For injuries, illness or disease unrelated to duty, RC members should seek medical attention from their personal healthcare providers.

Administrative Exemptions

This section provides criteria for administrative exemptions for selected military and non-military personnel (U.S. service members, DoD emergency-essential (E-E) civilian employees, other designated civilian personnel and comparable contractor personnel). It does not apply to medical exemptions.

Administrative exemption is applicable to retiring and separating personnel (without Reserve Component (RC) obligations and who do not plan to immediately re-enlist) and civilian employees and contractor personnel leaving a position subject to the AVIP with 180 days or less of service or employment remaining. This administrative exemption does not apply to personnel whom the commander determines shall receive the vaccine because of overriding mission requirements.

The Service Secretaries shall designate exemption authority for Service members, E-E and other designated civilian employees and comparable contractor and other personnel. Directors of Defense agencies shall designate exemption authority for affected personnel within their organizations. Commanders shall exempt from the AVIP

those personnel separating within 180 days (as described further below) who meet all of the following conditions: (a) they are not currently assigned or deployed to a designated higher threat area; (b) they are not scheduled to perform duty in a designated higher threat area (including temporary duty); and, (c) the commander has not directed vaccination because of overriding mission requirements. Personnel who meet these criteria should immediately identify themselves to their supervisors and commanders.

With respect to calculation of the 180-day period, the following specifications apply. For retiring or separating military personnel the applicable period is 180 days prior to their approved date of retirement or separation. RC members must have approved retirement orders to be effective within 180 days, reassignment date to the Non-Participating IRR/NARS, or expirations of enlistment within 180 days prior to consideration for exemption from the series. Those personnel who are separating from active duty but continuing service with the Selected Reserve must continue the entire series regardless of the mobility status. For E-E and other designated civilian and comparable employees and contractor personnel subject to the AVIP because of performance of essential contractor services, the applicable period is 180 days prior to the effective date of retirement, resignation, separation or reassignment out of a position subject to the AVIP.

The policy is effective no later than 60 days from the date of this memorandum for Service members and civilian personnel who are not members of a bargaining unit. Civilian personnel affected by this policy who are members of bargaining units will be considered for exemption consistent with applicable personnel management procedures.

Granting administrative exemptions is a personnel function, usually controlled by an individual's unit. Use the following exemption codes for electronic tracking of administrative exemptions. These codes may also be available in Service automated immunization tracking systems.

Administrative Exemption Codes:

| Code | Meaning | Explanation or Example | Duration |
|---|---|---|---|
| AD | Administrative, Deceased | Service member is deceased | Indefinite |
| AL | Administrative, Emergency Leave | Service Member is on emergency leave | Max 1 month |
| AM | Administrative, Missing | Missing in action, prisoner of war | Indefinite |
| AP | Administrative PCS | Permanent change of station | Max 3 months |
| AR | Administrative, Refusal | UCMJ Actions | Until resolution |
| AS | Administrative, Separation | Discharge, separation retirement | Indefinite |
| AT | Administrative, Temporary | AWOL, legal action Pending | Max 3 months |

Management Responsibility

The Secretary of the Army shall continue to function as Executive agent, managing and administering the overall program and acting as focal point for the submission of information from the Services relating to vaccine-associated adverse events and projected vaccine program

requirements. In addition, the Executive Agent shall monitor the Services' and affected Defense Agencies' implementation of the anthrax Vaccine Immunization Program and execute the Army's implementation plan.

The Secretaries of the Navy and the Air Force are responsible for AVIP execution within their respective Military Departments. The Directors of each Defense Agency are responsible for the execution of the AVIP within each of their respective agencies.

The senior military official from each of the Services previously assigned to direct and implement their respective anthrax vaccine implementation plan shall continue in this role. As such, they will implement, monitor, evaluate and document the AVIP in their respective departments, conform to standards established on medical protocols and informational materials, advise the Executive Agent of any special, operationally necessary implementation requirements of their respective Services, and establish procedures for coordinating and reporting required information to the Executive Agent. Defense Agency AVIP officials responsible for their AVIP execution shall conform to the same standards.

/s/ David S. C. Chu
David S. C. Chu

cc:
Chief of Staff of the Army
Chief of Naval Operations
Commandant of the Marine Corps
Chief of Staff of the Air Force
Surgeon General of the Army

Surgeon General of the Navy
Surgeon General of the Air Force